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Review of the provisions of the regulations on prospecting and exploration relating to the option of offering an equity interest in a joint venture arrangement, with a view to aligning all regulations in that respect and to making a recommendation thereon for consideration by the Council at its next session

Issues related to the possible alignment of the Authority's regulations on prospecting and exploration concerning the offer of an equity interest in a joint venture arrangement

Note by the Secretariat

I. Introduction

1. In 2013, the Council of the International Seabed Authority adopted the amendments to the regulations on prospecting and exploration for polymetallic nodules in the Area recommended by the Legal and Technical Commission, in addition to an amendment to regulation 19 (see ISBA/19/C/17, annex). In the same decision, the Council requested the Commission to review the provisions of the three sets of regulations on prospecting and exploration for, respectively, polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area relating to the monopolization of activities in the Area and the option of offering an equity interest in a joint venture arrangement, with a view to possibly aligning all three sets of regulations in that respect, and to make a recommendation thereon for consideration by the Council at its twentieth session, in 2014.

2. In 2014, at its twentieth session, the Assembly approved amendments to regulation 21 of the regulations on polymetallic nodules with regard to the monopolization of activities in the Area.¹ Owing to other priorities, such as work on

* ISBA/24/LTC/L.1.

¹ ISBA/20/A/9. The amendment, consisted of inserting the following paragraph after paragraph 6: "7. The Legal and Technical Commission may recommend approval of a plan of work if it determines that such approval would not permit a State Party or entities sponsored by it to monopolize the conduct of activities in the Area with regard to polymetallic nodules or to preclude other States parties from activities in the Area with regard to polymetallic nodules."; and of renumbering the following paragraphs accordingly.



the draft exploitation regulations, the Commission had to defer consideration of whether the regulations on polymetallic nodules should also be revised in connection with the election of an equity interest or a reserved area contribution by an applicant for a plan of work for exploration.²

3. In 2016, in its decision relating to the summary report of the Chair of the Legal and Technical Commission (ISBA/22/C/28, para. 13), the Council reiterated the request that the Commission review the provisions of the regulations on prospecting and exploration relating to the option of offering an equity interest in a joint venture arrangement with a view to aligning all regulations in that respect, and to make a recommendation thereon for consideration by the Council at its following session.

4. In July 2017, the Commission held a preliminary discussion on the basis of an analysis by the Secretariat of the issues that an alignment raises (ISBA/23/LTC/CRP.6). In the light of those discussions, the Commission requested a detailed analysis of the legal and policy implications of including or not the option of offering an equity interest in a joint venture arrangement in the regulations on polymetallic nodules before making a recommendation to the Council.

5. The present note has been prepared to assist the Commission in its review of that question.

II. Background information on the current non-alignment of the regulations on polymetallic nodules with the regulations on polymetallic sulphides and the regulations on cobalt-rich ferromanganese crusts in relation to the option of offering an equity interest in a joint venture arrangement

6. The regulations on polymetallic sulphides and on cobalt-rich ferromanganese crusts both provide that each applicant may elect either to: (a) contribute a reserved area to carry out activities in the Area; or (b) offer an equity interest in a joint venture arrangement with the Enterprise, subject to certain specified terms and conditions.² At the time of reporting, 10 applicants had elected to offer an equity interest in a joint venture arrangement for exploration work for polymetallic sulphides or for cobalt-rich ferromanganese crusts, in lieu of providing a reserved area. Only the Government of the Russian Federation had opted for contributing a reserved area for exploration for cobalt-rich ferromanganese crusts.³ The equity interest option has not yet been put into practice, as this option will only take effect at the exploitation phase. Neither have the terms and conditions of any joint venture arrangement been established, nor has any economic analysis of the value of such a joint venture to the Enterprise been undertaken.

7. No such election is possible under the regulations on polymetallic nodules.⁴ In an application for approval of a plan of work for exploration with respect to non-reserved areas, the total area, which need not be a single continuous area, must be sufficiently large and of sufficient estimated commercial value to allow for two mining operations. The applicant is also required to indicate the coordinates dividing the area into two parts of equal estimated commercial value. The Council, acting on recommendation of the Commission, decides which area is to be allocated to the applicant and which area will become reserved to the Authority, on the basis of the

² See regulation 16 of the regulations on polymetallic sulphides and of the regulations on cobalt-rich ferromanganese crusts.

³ See ISBA/20/C/4 and ISBA/20/C/24.

⁴ See regulation 15 of the regulations on polymetallic nodules.

estimated commercial value of each part. The data and information to be submitted before the designation of a reserved area are detailed in regulation 16 and section II of annex II to the regulations.

8. The reason why the regulations on polymetallic nodules only provide for the contribution of a reserved area derives from the constituent instruments of the Authority. The site-banking system is elaborated on in annex III, article 8, of the United Nations Convention on the Law of the Sea. Pursuant to that article, each application for exploration for polymetallic nodules by a developed State or an entity sponsored by a developed State must cover an area large enough to accommodate two mining operations and must be divided into two parts of equal estimated commercial value. The application must contain sufficient data and information to enable the Council to designate a reserved area based on the estimated commercial value of each part. Without prejudice to the powers of the Authority provided in article 17 of annex III, the data to be submitted concerning polymetallic nodules must relate to mapping, sampling, the abundance of nodules and their metal content. The regulations on polymetallic nodules elaborate on the data to be submitted by each applicant, and the Legal and Technical Commission is required in article 165 (2) (b) of the Convention to review plans of work and to submit recommendations to the Council based solely on the grounds stated in annex III.

9. The designation of a reserved area was confirmed in the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, which refers to reserved areas designated pursuant to article 8 of annex III as follows: "Designation of a reserved area for the Authority in accordance with annex III, article 8, of the Convention shall take place in connection with approval of an application for a plan of work for exploration or approval of an application for a plan of work for exploration and exploitation" (annex, sect. 1, para. 10).

10. Members of the Commission will also recall the circumstances that have led to the current non-alignment of the three sets of regulations. The regulations on polymetallic sulphides and the regulations on cobalt-rich ferromanganese crusts provide an alternative to the designation of a reserved area because of the difficulties in transposing the reserved area approach, which is principally designed for two-dimensional resources (polymetallic nodules), to three-dimensional resources (polymetallic sulphides and cobalt-rich ferromanganese crusts). The regulations on polymetallic sulphides and the regulations on cobalt-rich ferromanganese crusts have, nevertheless, kept the option of contributing a reserved area. In the case of polymetallic sulphides and cobalt-rich ferromanganese crusts, which are three-dimensional in nature, no two occurrences are the same, and there may be substantial variation in grades of deposits, even within one seamount in the case of cobalt-rich ferromanganese crusts deposits, whereas in the case of polymetallic nodules, which are two-dimensional in nature, it is relatively easy to divide a potential nodule field into two areas of equal estimated commercial value. It was therefore considered that, in many cases, it would not be possible to determine two sites of equal estimated commercial value without substantial and costly exploration work. Consequently, it appeared to members of the Authority that it would be impracticable to implement a site-banking approach for polymetallic sulphides and cobalt-rich ferromanganese crusts in the same manner as for polymetallic nodules.

11. A decade separates the adoption of the regulations on polymetallic nodules from that of the regulations on polymetallic sulphides, on which, in turn, the regulations on cobalt-rich ferromanganese crusts were modelled. The non-alignment occurred at the time of adoption of the regulations on polymetallic sulphides. The sequence of adoption of the regulations shows that the differences between the regulations are due to the specific characteristics of polymetallic sulphides and cobalt-rich

ferromanganese crusts, which, it was expected, would make it very difficult for an applicant to submit two areas of estimated equal commercial value.

III. Legal and policy implications of the non-alignment of the regulations on polymetallic nodules

12. The designation of reserved areas is a key feature of part XI of the Convention and of the 1994 Agreement. Its ultimate objective is to ensure that reserved areas are set aside for the conduct of activities by the Authority through the Enterprise or in association with developing States. This is often referred to as the site-banking system. In the case of polymetallic nodules, the site-banking system has proved that it was operational. Since 2008, the Council has approved six applications for the exploration for polymetallic nodules in reserved areas in the Clarion-Clipperton Fracture Zone, each sponsored by a States member of the Authority, namely from Nauru Ocean Resources Inc. (sponsored by Nauru), Tonga Offshore Mining Limited (sponsored by Tonga), Marawa Research and Exploration Ltd. (sponsored by Kiribati), Ocean Mineral Singapore Pte. Ltd. (sponsored by Singapore), Cook Islands Investment Corporation (sponsored by the Cook Islands) and China Minmetals Corporation (sponsored by China). In addition, and as mentioned above, this option has even been elected by an applicant in the case of cobalt-rich ferromanganese crusts, demonstrating that the site-banking system can be implemented without any difficulty as soon as sufficient data are available.

13. Currently, the size of available reserved areas is 770,729.9 km² in the Clarion-Clipperton Fracture Zone and 158,853 km² in the Indian Ocean. With an exploration area of 75,000 km² per contract, this represents the possibility of 12 contracts for exploration for polymetallic nodules in reserved areas. Exploration activities in the reserved areas would also generate data and information on the marine environment, the topography and the mineral resources. Those data and information assist the Authority in developing regional environmental management plans and its database, and in administering the common heritage of mankind. Collectively, the reserved areas and the resources contained therein represent the core financial asset available to the Enterprise in the future and a key element in giving effect to the principle of the common heritage of mankind.

14. The designation of reserved areas for exploration for or exploitation of polymetallic nodules by the Enterprise or in association with developing States enables direct participation in the development of mineral resources by the Authority or developing States, or entities sponsored by them. The existence of reserved areas also enables qualified applicants to participate in the exploration for polymetallic nodules in the Area and to prepare themselves to proceed to the exploitation stage. Furthermore, each contractor for exploration in a reserved area provides and funds multiple training opportunities.

15. The Commission may also wish to consider the legal implications of a non-alignment of the regulations on polymetallic nodules. It may be noted that article 8 of annex III refers explicitly to polymetallic nodules, and it may be argued that article 8 was drafted with polymetallic nodules only in mind and tailored to the specific features of that mineral category. Furthermore, it may be recalled that, at the time of drafting that provision, research for polymetallic nodules had made data and information thereon available, which was not the case when the Authority embarked on elaborating the regulations on polymetallic sulphides and cobalt-rich ferromanganese crusts. The Commission may need to consider the implications of revisions to the regulations given that those regulations are subject to the provisions

of the Convention and the 1994 Agreement, as well as other rules of international law not incompatible with the Convention.

IV. Legal and policy implications of the alignment of the regulations on polymetallic nodules

16. In the context of polymetallic sulphides and cobalt-rich ferromanganese crusts, where the contribution of a reserved area is in competition with the offer of an equity interest in a joint venture arrangement, the practice since 2012 shows that all applicants but one have elected the latter option. Such a joint venture arrangement takes effect at the time when the applicant enters into a contract for exploitation. Within the framework of a joint venture, the Authority will therefore be able to participate, at least in principle, in the development of the resources of the Area. If the applicant does not enter into a contract for exploitation, however, the equity interest in a joint venture arrangement never takes effect and the benefits to the Authority are nil. Since the terms of any future joint venture arrangement have not been determined, it is unclear whether the value of a future joint venture is comparable with the known value of a reserved area.

17. If the regulations were aligned and future applicants elected to offer an equity interest rather than contributing reserved areas, this would have an impact on the reserved areas available for applications for approval of plans of work for exploration. The possibility of having fewer reserved areas in future would mean fewer opportunities for developing States to participate directly in activities in the Area, either in applying for the approval of plans of work or in sponsoring entities for the same purpose. Furthermore, the equity interest option would not result in the generation of data and information that would be available to the Enterprise or a qualified applicant from a developing member State of the Authority through the reserved area option.

18. The Commission may also wish to take into account the following legal implications of the revision to the regulations on polymetallic nodules to create an alternative to the contribution of a reserved area.

19. The first implication is in the light of the principle of uniform and non-discriminatory treatment among contractors by the Authority. Plans of work are approved on a uniform and non-discriminatory basis. This guarantees that contractors are treated equally and that none is given an advantage over others. If the regulations on polymetallic nodules were aligned with the other regulations, future contractors would have the choice to opt for an equity interest in a joint arrangement and therefore would spare the exploration costs and time that contractors that had no choice but to contribute a reserved area spent in collecting and analysing data and information to enable them to submit an application with two sites of equally estimated commercial value.

20. Furthermore, the Commission may wish to consider the implementation of the principle of non-discrimination in the context of the special processing of applications for approval of plans of work for exploration submitted by registered pioneer investors and the so-called "potential applicants".

21. The 1994 Agreement describes potential applicants as entities that have expended an amount equivalent to \$30 million in research and exploration activities and no less than 10 percent of that amount in the location, survey and evaluation of

the area referred to in the plan of work.⁵ In this regard, the Commission may wish to consider whether the alignment would introduce a discrepancy in the following ways.

22. Firstly, the Commission may wish to discuss whether the alignment of the regulations on polymetallic nodules would create a discrepancy between potential applicants that would have applied prior to the alignment (such as Germany represented by the German Federal Institute for Geosciences and Natural Resources)⁶ and those that would apply after the alignment and have the possibility to opt for an equity interest in a joint venture arrangement.

23. Secondly, the Commission may wish to examine whether the alignment would result in a discriminatory treatment between the registered pioneer investors that all became contractors in 2001 and 2002 and the eligible potential applicants, which could now opt for the equity interest. In that regard, in comparing the treatment between potential applicants and registered pioneer investors, the Commission may wish to consider section 1, paragraph 6 (a) (iii), of the annex to the 1994 Agreement, in which it is stipulated that, in accordance with the principle of non-discrimination, a contract with a potential applicant shall include arrangements which shall be similar to and no less favourable than those agreed with any registered pioneer investors. If any of the potential applicants were granted more favourable arrangements, the Council should make similar and no less favourable arrangements with regard to the rights and obligations assumed by the registered pioneer investors, provided that such arrangements did not affect or prejudice the interests of the Authority.

24. Thirdly, the Commission may wish to consider whether the alignment would create a difference of treatment between contractors and new applicants, including potential applicants, which could opt for an equity interest in a joint venture arrangement. In this regard, the Commission may consider the requirement in regulation 21, paragraph 12, to apply the regulations on polymetallic nodules in a uniform and non-discriminatory manner in its consideration of applications.

25. Lastly, the Commission is invited to consider the conformity of an alignment of the regulations with the constituent instruments of the Authority, given that, as mentioned above, the regulations of the Authority have to be consistent with them. If an alignment were made, an applicant would have the choice between contributing a reserved area and offering an equity interest in a joint venture arrangement. The question then arises as to how this could be reconciled with the provisions of annex III, article 8, of the Convention, which only refers to the designation of a reserved area, to give effect to the parallel system in the case of polymetallic nodules. The Commission should therefore consider whether an alignment is possible without amending that article.

V. Conclusion

26. The Commission is invited to conclude its discussions on the present matter and to make a recommendation to the Council.

⁵ This provision of the annex to the 1994 Agreement corresponds to the definition of those eligible to apply for pioneer status provided in resolution II, paragraph 1 (a), of the Third United Nations Conference on the Law of the Sea.

⁶ See ISBA/11/C/10.